IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

TONY ORLANDO PRICE,	)	
	)	**Civil Action No. 7:04-cv-00224**
Petitioner,	)	
	)	
v.	)	**MEMORANDUM OPINION**
	)	
GENE JOHNSON, VIRGINIA DEPARTMENT OF CORRECTIONS,	)	**By: Samuel G. Wilson United States District Judge**
	)	
Respondent.	)	

This is a petition by Tony Orlando Price pursuant to 28 U.S.C. § 2254, challenging his convictions in the Circuit Court of the City of Danville for malicious wounding by stabbing and maliciously causing bodily injury with a caustic substance. Price threw bleach in his wife's face, severely beat her, and later stabbed her. Price claims that his counsel provided ineffective assistance at trial, that the trial court erred by refusing to accept Price's Alford plea and by denying Price's motion to withdraw his guilty plea, and that the evidence presented at trial was insufficient "to support a finding of guilt beyond a reasonable doubt." The court finds that each of Price's claims is procedurally defaulted, meritless, or unreviewable on federal habeas . Accordingly, the court dismisses Price's petition without prejudice.

I.

In the Circuit Court of the City of Danville, Price pled guilty to malicious wounding by stabbing and maliciously causing bodily injury with a caustic substance,[1] and the court sentenced him to two

[1]Though the charges arose from acts allegedly committed against a single victim during the course of one day, Price was charged in two separate indictments.

twelve-year sentences with six years of each suspended. The Court of Appeals of Virginia refused Price's petition on December 18, 2002, and a three-judge panel of that court also refused Price's petition on April 2, 2003. On August, 26, 2003, the Supreme Court of Virginia denied Price's petition for an appeal, and that court denied his petition for a rehearing on November 7, 2003. Contemporaneous with his direct appeal, Price filed a habeas corpus petition with the Supreme Court of Virginia on June 3, 2002, which that court dismissed on November 19, 2002.

In his federal habeal petition, Price raises the following claims:

1) that his attorney provided ineffective assistance

A) by advising Price to enter a guilty plea,

B) by failing to investigate the character of the prosecution's main witness,

C) by failing to challenge the initial responding officer's investigative techniques and failing to demand fingerprinting of a knife found in the possession of the victim,

D) by failing to submit photographic evidence of a knife wound on Price's hand, and

E) by failing to "obtain a written agreement detailing his promise of concurrent sentences on each conviction within the sentencing guideline range of two years, six months to six years, three months;

2) that the trial court erred by not accepting Price's Alford plea;

3) A) that the trial court erred by denying Price's motion to withdraw his guilty plea and

B) that its denial of his motion deprived him of due process; and

4) that the evidence at trial was insufficient "to support a finding of guilt beyond a reasonable doubt on either indictment."

The court addresses each of these claims in turn.

II.

The court finds that Price's ineffective assistance claims (Claim 1) and his due process claim (Claim 3B) are exhausted but procedurally defaulted because he raises them for the first time on federal habeas,[2] and a state remedy is no longer available.[3] See Teague v. Lane, 489 U.S. 288, 297-99 (1989). Because Price has not demonstrated any cause and prejudice to excuse his procedural defaults, the court dismisses those claims.

III.

Price did present his claim that the trial court erred in refusing to accept his Alford plea (Claim 2) to the Court of Appeals of Virginia, which, when dismissing his petition, stated that Price, "never

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[2]Price did raise several ineffective assistance claims on state habeas, but because the factual bases underlying those claims are completely different from those set forth in his federal habeas petition, Price's current ineffective assistance claims must be treated as new claims. See 28 U.S.C. § 2254(e)(2); Matthews v. Evatt, 105 F.3d 907, 911-12 (4th Cir. 1997). Price claims that his state habeas claim that counsel "failed to obtain all available information at his disposal to assure Price would receive a fair and just evaluation of sentence regarding his Alford plea" encapsulated the five more specific claims raised here; however, the court finds that this blanket assertion did not "fairly present" the very specific questions raised here to the Virginia courts in a manner allowing for the meaningful state court review contemplated by the exhaustion doctrine. See Matthews, 105 F.3d at 911-12.

Similarly, Price has previously raised a claim based on the trial court's denial of his motion to withdraw his guilty plea, but he has never styled this challenge a due process claim. He does so for the first time on federal habeas, and the court again finds that Price has not "fairly present[ed]" this due process claim to the state courts in a manner capable of satisfying the exhaustion requirement. See id.

[3]Under Va. Code § 8.01-654(B)(2), "[n]o writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition." The record reveals that Price had knowledge of the factual underpinnings of his current ineffective assistance and due process claims at the time he filed his original state habeas petition, so those claims would be barred were Price to attempt to raise them in a new state habeas proceeding.

entered Alford pleas for the trial court to refuse." A review of the record confirms the finding of the Court of Appeals of Virginia that Price never unambiguously offered an Alford plea.[4] Price has not presented clear and convincing evidence that this factual finding was made in error, see 28 U.S.C. § 2254(e)(1), nor has he shown the determination of the Court of Appeals of Virginia to be "an unreasonable determination of the facts in light of the evidence presented."See 28 U.S.C. § 2254(d). Thus, his claim is a nonstarter, and the court dismisses it.[5]

IV.

Price contends that the trial court erred by refusing to allow him to withdraw his guilty plea (Claim 3). The thrust of this claim is whether the trial court abused its discretion in denying his motion,[6] and that is an issue of state law not reviewable on federal habeas.[7] See 28 U.S.C. § 2254(e)(2) (limiting federal habeas review to claims related to violations of the Constitution and federal law).

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[4]After a lengthy discussion with the court and consultation with his attorney, when asked whether he was "entering pleas of guilty to the[] charges because [he was], in fact, guilty of the crimes charged," Price responded, "Yes." Later, the judge revisited this inquiry: "I want to ask you whether or not you understand that by your pleas of guilty in these cases you are acknowledging your guilt, in fact, of the offenses charged?" Price again responded in the affirmative.

[5]Moreover, there is no constitutional right to enter an Alford plea, so Price's claim is not of constitutional significance.

[6]See Hall v. Commonwealth of Virginia, 515 S.E.2d 343, 346 (Va. Ct. App. 1999) ("Whether a defendant should be permitted to withdraw a guilty plea rests within the sound discretion of the trial court to be determined based on the facts and circumstances of each case.").

[7]Again, Price has raised a separate due process claim based on the same factual predicate, but that claim is exhausted but defaulted. Further, even if the claim were reviewable on federal habeas, the Court of Appeals of Virginia found that the trial court did not abuse its discretion. Due to the deference owed to state court decisions on the merits, see 28 U.S.C. § 2254(d), and based on the record, this court would not disturb that decision were the issue squarely before it.

V.

Price claims that there was insufficient evidence "to support a finding of guilt beyond a reasonable doubt on either indictment" (Claim 4), a claim that the Court of Appeals of Virginia found to have been waived as part of Price's voluntary and intelligent guilty pleas.[8] In light of the circuit court's finding that Price's pleas were "freely, voluntarily, intelligently and knowingly made with an understanding of the offenses charged as well as an understanding and appreciation of the consequences of [his] plea," [9] the Court of Appeals' finding that Price knowingly and voluntarily waived his insufficient evidence challenge was not "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; nor was it "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." See 28 U.S.C. § 2254(d). The court, therefore, dismisses the claim.

VI.

For the foregoing reasons, the court dismisses Price's § 2254 petition.

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[8]The Court of Appeals of Virginia made this finding when denying Price's petition for appeal. Under Virginia law the dismissal of a petition for appeal is a decision on the merits, see Griffin v. Commonwealth of Virginia, 606 F.Supp. 941, 946 (D.C. Va. 1985) (citing Saunders v. Reynolds, 204 S.E.2d 421, 424 (Va. 1974)); thus, it is entitled to the deference mandated by 28 U.S.C. § 2254(d).

Further, to the extent Price is claiming that there was insufficient evidence to support his plea, the evidence put forth on the day he entered his guilty pleas renders the claim frivolous.

[9]During the plea colloquy, the court asked, "Do you understand that by pleading guilty you may waive any right to appeal the decision of this Court?" Price responded, "Yes."

ENTER: This 3rd day of November, 2004.

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UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

TONY ORLANDO PRICE,	)	
	)	**Civil Action No. 7:04-cv-00224**
Petitioner,	)	
	)	
v.	)	**FINAL ORDER**
	)	
GENE JOHNSON, VIRGINIA DEPARTMENT OF CORRECTIONS,	)	**By: Samuel G. Wilson United States District Judge**
	)	
Respondent.	)	

In accordance with the written memorandum opinion entered this day, it is hereby **ADJUDGED** and **ORDERED** that the above referenced 28 U.S.C. § 2254 petition, is hereby **DISMISSED**. This action is stricken from the active docket of this court.

Price is advised that he may appeal this decision pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure by filing a notice of appeal with this court within 30 days of the date of entry of this Order, or within such extended period as the court may grant pursuant to Rule 4(a)(5).

The Clerk is directed to send certified copies of this order and the accompanying memorandum opinion to the petitioner and to counsel of record for the respondent.

ENTER: This 3rd day of November, 2004.

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UNITED STATES DISTRICT JUDGE